THE CONVENTIONS OF THE INDIAN CONSTITUTION

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INTRODUCTION

THIS paper read before the Political Section of "The 1921 Club" is intimately associated with the political activities of Dr. Annie Besant. Her internment in 1917 was the climax of the work of the Indian National Congress from its inception. It is now a matter of history how as the result of her agitation Mr. E. S. Montagu, Secretary of State for India, came to India and toured with the Viceroy. Then, as the result of many committees both in India and England, the Montagu-Chelmsford reforms were inaugurated in 1921. Those reforms were rejected by the Congress as "inadequate, unsatisfactory and disappointing". But a certain number of political workers accepted them for what they were worth, with the clear intention of working strenuously for further reforms. With this object in view, Dr. Besant started a political association called "The 1921 Club," that date referring to the reforms then

inaugurated. Her intention was to work immediately for the next stage, in order that full Dominion Status might be achieved. One activity of the Club was to meet regularly to discuss along what lines work could be pressed forward for the further reforms.

Several members of the Club addressed it on various aspects of the new developments, and usually much discussion took place after each address. When my turn came to help in the work of the Club, I offered to read a paper on the subject of Conventions of the Constitution. This subject had been studied carefully by me during my college days in Cambridge. Though those studies were over 20 years ago, it was still possible for me to revive their memories by a little reading, and so prepare a paper for the Club.

On October 15, 1921, my paper was read, and much discussion took place as usual. In the course of the discussion one member, Mr. V. S. Ramaswami Sastri, then assistant editor of *New India*, a brother of the Rt. Hon. V. S. Srinivasa Sastri, P. C., stated that in his opinion a far better way of hastening India to Dominion Status would be to call Conventions of the people, as had been done both in U.S.A. and France. This idea appealed very strongly to all present, and it was promptly adopted.

" The Political Section of the Club sent Dr. Annie Besant to Simla in September, 1922, where the

Indian Legislature was in session, to seek the views of its members; informal meetings were held by certain members of each House separately, and both approved the idea of calling a Convention. A joint meeting was held, and it elected an Executive Committee from among themselves to call a Conference of members of the Central and Provincial Legislatures to arrange to call a Convention.

"The Conference, called the National Conference, met at Delhi in February, 1923, during the session of the Indian Legislature, and after some days' discussion, it outlined the essentials of a Constitution which would carry out the resolution of the Indian National Congress of 1918 to place India on an equality with the Self-Governing Dominions of the British Empire. The Conference Executive drew up a pledge for candidates for the Legislatures at the forthcoming elections in the autumn, accepting the outline of the Constitution and binding them to call the Convention.

"This preliminary work being done, the Conference met a second time in February, 1924. It approved the work of the year 1923, and called the Convention, into which it then merged itself, to meet in April, 1924. The Convention consisted of Members and ex-Members of the Legislatures, Central and Provincial (231), the members of the Council of the National Home Rule League (19), the elected representatives of the Political Sections of the

'1921 Clubs' in Madras, Bombay, and Calicut (3), the co-opted representatives of the Indian Women's Association (2), and the late Law Member of the Governor-General's Council, 256 in all, and this Convention was responsible for the 'Commonwealth of India Bill'.

"The Convention divided itself into seven Committees to deal with different sections of a Constitution to establish Self-Government, and they were directed to report in the autumn of the same year. A draft was based on these reports, and the Convention sat in Bombay in December and considered and amended it. It printed the results and circulated them to political parties, inviting further amendments, and it also submitted the draft to a sub-committee appointed by a Committee of all parties, presided over by Mr. M. K. Gandhi in November, 1924. This sub-committee made a number of amendments, and these with all others were submitted to the Convention sitting in Cawnpore on April 11, 12, and 13, 1925; it was finally submitted to a Drafting Committee in Madras, consisting of the Hon. Mr. C. P. Ramaswami Aiyar, Messrs. B. Shiva Rao, N. Sri Ram, Yadunandan Prasad and Dr. Annie Besant, with power to correct any oversights in language where necessary, to see the Bill through the press, and publish it in the name of the Convention."

As all who have followed the plans of the Indian National Congress are aware, the

Congress has been for some years against the idea of gaining Swarāj through any legislation of the British Parliament. Its aim has been to proclaim India's Independence—whether we are to think of that Independent India as outside the British Empire or as a part of it does not affect the issue—as the result of a direct act of the people of India. It is however obvious that, as matters are moving in 1931, India's Independence will come only with the co-operation of the British Parliament and only through a bill of that Parliament. In other words, India's political development appears to be following the model of Britain's political development.

It is because of this similarity in situation that the subject of Conventions of the Constitution is important in India. Were India to achieve Swarāj by a written Constitution like that of the U.S.A., then Conventions of the Constitution would be superfluous. But just because the likelihood is that the method will not be a clear and formulated Constitution, but rather by an act of Parliament in logical relation to previous Parliamentary acts, the development of political growth in India will have to be largely by way of Conventions of the Constitution.

Since this paper was written in 1921, changes have taken place in English law abolishing or modifying some of the Conventions referred to as existing in England. It is not necessary

however to modify or change in this regard the original paper as read before "The 1921 Club". I republish it only in order to give to young political workers some idea of one way of constitutional development, and a way which I think is more suited to the genius of the Indian people than any other so far suggested.

CONVENTIONS OF THE CONSTITUTION

EVERY State has three recognisable functions, (1) the Executive, (2) the Legislative, and (3) the Judicial. The principles which regulate their actions constitute what is termed Constitutional Law. Constitutional Law, in many countries, is found primarily in what is called the "Constitution". This Constitution may be a written one, as in the United States; in that country, there is a definite and clear document called "The Constitution of the United States established and ordained by the People of the United States". But a Constitution may also be partly written and partly unwritten, and this is the case in England.[1]

Because the Constitution of England is not to be found in one single document, it has been sarcastically said that England has no Constitution at all. But England has indeed a Constitution, though it is not easy to discover where it is. Dicey, the

[1] In accordance with popular language, I mean by England the United Kingdom of Great Britain.

foremost authority on the English Constitution, describes facts correctly when he says that a person

> may search the Statute-book from beginning to end, but he will find no enactment which purports to contain the articles of the constitution.

If one were to ask an Englishman whence he derives his inalienable rights to "life, liberty and the pursuit of happiness," he might possibly, if he remembered his school history, cite Magna Carta (1215), the Petition of Rights (1628), Habeas Corpus (1679), and the Bill of Rights (1689). Certainly some elements of the English Constitution are found in these and other enactments passed by Parliament. But there are other elements of the Constitution which are not to be found in any law at all. This is the *unwritten* part of the Constitution, which is one of the unique characteristics of England.

The English Constitution has been defined as consisting of two elements:

1. *The Laws of the Constitution.* These are composed either of Acts of the Supreme Legislature, which is the King, the Lords and the Commons, or of Rules derived from custom, tradition, or the maxims called Common Law. They are enforced by a court of law without question, and this differentiates them from the second element.

2. *The Conventions of the Constitution.* These are not laws at all; they are not written, nor alluded to, in any act; and no court of law will enforce them. They are merely rules of "constitutional

morality". Let us take two instances, to illustrate the difference between "laws" and "conventions". Now the King of England must be a Protestant, and a member of the Church of England, and he must not marry a Papist. This is a Law of the Constitution, enacted in 1700. Also, the House of Lords must not originate a money bill. But this is a Convention of the Constitution. As the Lords have the right to initiate any legislation which they like, surely they can, of right, bring in a bill in their House dealing with taxation? But to do this is to go against constitutional law. Similarly, too, is the Convention that the Lords must not amend the provisions of any money bill sent up from the House of Commons.

A rule becomes a convention by accepted usage. This convention against the Lords originating a money bill began in 1407, when the Commons first claimed that all grants of supply to the King must originate with them. In 1661, when the Lords passed and sent to the Commons a Bill for "paving, repairing and cleaning the streets and highways of Westminster," the Commons rejected the Bill, since it meant spending the tax-payer's money, and they held that the Lords had nothing to do with spending the people's money. The Commons, then, themselves passed a Bill to repair the streets. The Lords, with a proviso that their action should not be made a precedent, passed the bill, but only, as they said, "out of their tender and dutiful Respects

to His Majesty, who is much incommoded by the Neglect of those High ways and Sewers." But the Commons objected to the proviso. A quarrel then arose between the two Houses, and finally the Bill was dropped. Next year, the Commons brought up a similar Bill, and the Lords then passed it. Even as late as 1860, the Lords questioned the convention that they could not amend a money bill. They rejected one part of a money bill sent up from the Commons, while passing the other. This created a crisis. But next year the Commons under Gladstone forced the Lords to give way. The practical reason, why the Commons have won in this matter all along the line, is that the King could perhaps exert more pressure on the House of Lords than on the Commons, by court influence and by grant of titles and privileges. The Commons have ever been jealous of a possible alliance of King and Lords, and so both had to be made dependent on the Commons for supply.

I mentioned, in the definition of a convention, that it was a rule which, however fully accepted by Parliament, would not be put into operation by a court of law. A convention may have very great force, but it is the force of a voluntary agreement. It is in parliamentary procedure what a "gentleman's agreement" is in business. It facilitates joint action. Just as in business it is sometimes more convenient not to put a gentleman's agreement into writing, and so make it a formal contract, so it is

with conventions in constitutional law. They have grown up with the English Constitution, because of its very nature.

Let us first take those conventions which deal with the powers of the King. The King has two kinds of powers: first, those secured to him by law; and secondly, those which he has by ancient usage, and which are known as his "prerogative". Both these divisions of powers are limited by conventions.

By law, it is the King's right to withhold his assent, if he so desires, from any Bill passed by Lords and Commons. The Bill cannot become a law without his signature. But by a convention, the King must *not* withhold his assent, when a Bill has been passed by both Lords and Commons. The last sovereign to exercise the "veto" was Queen Anne. (It is interesting to note, in passing, that the King's right to veto bills of *Colonial* Legislatures is expressly stated in the acts creating those Legislatures, and this possible veto of his makes a very strong bond between Colonial subjects and the King. Some have suggested that the only real bond which holds the British Empire together is the King's veto!)

A second convention is that the King cannot preside at a meeting of the Cabinet. The Cabinet, though it is the very heart of the Executive, is as a body utterly unknown in English law. Members of the Cabinet are only such of the Privy Councillors

as are appointed "principal Secretaries of State". Now, whenever the Privy Council meets, the King presides. But though the Cabinet is nothing more than an informal Committee of the Privy Council, yet by convention the King cannot preside at its meetings. This convention arose by pure accident. Till the time of George I, the sovereign presided at the meetings of the ministers. But George I knew only a little English, and he was bored by proceedings which he could not follow; so he began to absent himself from meetings of the ministers. Subsequent sovereigns, for various reasons, followed his example; and ministers found that policies could be discussed and settled more easily in the King's absence. Hence quickly it became a convention that the King should not be present at a Cabinet meeting. The Prime Minister however must, by constitutional procedure, send to the King a report of what is transacted at a Cabinet meeting.

It was this convention, that the King should not preside at a Cabinet meeting, which has made possible true party Government. For, from then, the King's executive functions have been forced to work through ministerial channels, and, as Lord Acton says significantly, "the power of governing the country was practically transferred. It was shared, not between the minister and the King, but between the head of the ministry and the head of the opposition."

The right to pardon is a part of the King's prerogative. In theory, it can be exercised how and when he will. But, by convention, this prerogative of mercy must be exercised only through a minister. George III wrote privately to the Lord-Lieutenant of Ireland to issue a pardon; on this becoming known to Peel, who was then Home Secretary, Peel protested vigorously to the King. Since then, the "King's mercy" is exercised only with the consent of his minister for Home affairs.

The King's prerogative to appoint whom he likes as ministers is limited by convention. In practice, he must select as his Prime Minister a member of Parliament, either of the Lords or Commons, whose political party has a majority in the Commons. And he must appoint as his ministers only those recommended to him by the Prime Minister.

It is within the King's prerogative to create Peers of the Realm, who are members of the House of Lords. But in practice, he must create such Peers only with the advice of the Prime Minister. One might say that to-day the King cannot confer any great dignity on a subject, unless the Prime Minister concurs. More than this, the King must create Peers of the Realm, even against his personal inclination, if the Prime Minister judges it necessary. This was settled both in 1832 under William IV, and in 1910 under King George V, when on both occasions the Lords refused to bend to the will of the Commons. The Prime Minister then wrung a

promise from the Sovereign on each occasion to create enough new Peers to outvote in the House of Lords those who opposed the Commons' will. The Lords then gave way, rather than have their House swamped by new Peers, who were merely the nominees of the Commons.

Another convention limiting the royal prerogative is that the King must not act independently of ministers. George IV used to hold private communications with foreign ambassadors. But in 1825, Canning, when he became Foreign Secretary, said: "I should be very sorry to do anything unpleasant to the King, but it is my duty to be present at every interview between His Majesty and a foreign minister." Similarly, that the King should not publicly intervene in political discussion is now a settled convention, and we veil his limitation by saying that "the King is above party". Dicey holds that of late, especially due to Queen Victoria, a new convention has sprung up, enlarging the prerogative of the King; it is that the King may give public expression, by speech or proclamation, to the "moral feelings of his subjects". King George V has done this several times, and on matters nearly verging on political issues.

It is the King's prerogative to dissolve Parliament at his will, but it is a convention that he should do so only at the Prime Minister's request.

There are conventions limiting the action of the Lords. One has already been mentioned, that they

must not initiate or amend money bills. Another arises from the fact that the House of Lords sits as the Supreme Court of Appeal in England. In theory, that Court is composed of all Peers. It is however a convention that no Peer, unless he is a "law lord," shall take part in the judicial functions of the House.

There are many conventions guiding the actions of ministers. A minister of the Crown is known in law as a "Principal Secretary of State". But there is no such person known in the Constitution as the "Prime Minister"! He is not mentioned in any act of Parliament or record of either House; he receives no salary, and he has no staff. He is a convention. In State functions, before 1905, his place of precedence was merely as one of the Secretaries of State, "one degree below the Vice-Chamberlain of the Royal Household, and next above the eldest son of a Viscount". Disraeli, in signing the Treaty of Berlin, described himself as the "Prime Minister of England," but it is not a title recognised by law in England. In 1900, the *Court Circular* from Windsor "whether through inadvertence, or in a deliberate spirit of daring innovation, alluded to the Marquess of Salisbury as Prime Minister". It was only in 1905 that the Prime Minister was given "a local habitation and a name" by a Royal proclamation, which gave him precedence as "our Prime Minister" just after the Archbishop of York.

Equally astonishing is that the Cabinet too is a convention. In the official summons to meet sent by the Prime Minister, the members of the Cabinet are called merely " His Majesty's Servants ". The first reference to the "Cabinet," in a record of the House of Commons, occurs when an amendment to the Address was moved on December 10, 1900: " We humbly express our regret at the advice given to your Majesty by the Prime Minister in recommending the appointment of so many of his own family to offices in the Cabinet."

Nevertheless, there are several conventions governing the action of the Prime Minister and the Cabinet members. Of these, the most important is that, when a Ministry is defeated at a General Election, the Cabinet must resign. A corollary to this is that, after an adverse vote in the Commons, on a matter of importance, the Cabinet must resign. " Snap divisions," where the Government is in a minority, do not count. But if, after a division lost on an important issue, the Cabinet does not resign, the late Lord Salisbury has said that " they are held to have broken the unwritten law, or, at all events, to have strained it ". For it is a convention that the Cabinet must resign, when it ceases to command the confidence of the House of Commons.

Another important convention is the collective responsibility of the Cabinet. Lord Morley has stated it humorously as follows: " The Chancellor

of the Exchequer may be driven from office by a bad despatch from the Foreign Office, and an excellent Home Secretary may suffer for the blunders of a stupid Minister of War." The Cabinet stands or falls together. Parallel to this is the convention that a Minister's actions in his department must be such as will be endorsed by his colleagues. In 1851, Palmerston, then Foreign Secretary, on his own initiative expressed to the French Ambassador "his entire approbation of the act of the President" of the French Republic, and this after the Cabinet had decided for strict neutrality and non-interference in French affairs. Lord John Russell, the Prime Minister, asked for Palmerston's resignation. By a turn of fate four years later, Lord John Russell himself quitted office, because at Vienna he had made certain proposals which failed to gain the approval of his colleagues. It is a convention that a Minister must be in Parliament, but there is no statute or legal usage which requires it. In fact, from December 1845 to July 1846, Gladstone was a Secretary of State, though he was not in Parliament. But the convention is based on practical convenience, because the Ministers are go-betweens between the King and Parliament.

There are some conventions concerning Parliament which are noteworthy. The most important is that Parliament must be summoned each year. But there is no law making it obligatory

on the King to summon Parliament each year. But he must do so, and that for a reason characteristic of many conventions. I have said that a convention will not be enforced in a court of law. That is perfectly true. But several conventions, if broken, bring the King's officers under the law. This is the case with regard to the convention about annual sessions. There is a law called the Mutiny Act, which exempts from liability to prosecution for assault all military and naval officers who may need to punish those under them for disobedience. If this Act is not passed, a soldier punished by his officer can bring an action for assault against that officer, for the relation of officer and private is not recognised in Common Law. Now the House of Commons, jealous since the days of the Stuarts of the King's prerogative to keep a standing army, used to control that prerogative by passing the Mutiny Act for the duration of one year only. For unless the men in the army and navy are to revert to private citizens, the Commons must pass the Mutiny Act each year, and thus allow officers to enforce discipline. Though all fear of a standing army is now gone, the Mutiny Act is still passed each year.[1] This necessitates the summoning of Parliament each year.

[1] Since the writing of this paper in 1921, a law has been enacted on the matter, and the passing annually of the Mutiny Bill is no longer necessary.

It is a convention that certain taxes are imposed each year; the duty on tea[1] and the income-tax are imposed by yearly acts. If Parliament were not to be called in any year, no one the next year need pay income-tax, and his tea would be cheaper. The income-tax has for years been collected "in virtue not of an Act, but of a resolution of the House of Commons passed long before the income-tax for the coming year came into existence". Now, in 1909, the Lords rejected the Budget, owing to their disapproval of certain of its clauses. Technically they were within their right, but they violated a convention, with the result that the King's officers, in the execution of their duty, came into clash with the Common Law. Mr. Gibson Bowles, M.P., brought an action against the Bank of England, claiming payment of the sum which that Bank had deducted from such part of his income as was paid to him through the Bank, which is a State institution. The Bank deducted the income-tax following the usual procedure, for the Budget used automatically to become law. But the Lords had thrown out the Budget, with the result that the Bank's normal action of deducting the tax became illegal. Mr. Gibson Bowles, who was an old Parliamentarian, well versed in constitution law, entered into his action in a spirit of pure fun; the judges

[1] Duty on tea has been abolished since the writing of this paper. But it may be restored any time, if a Chancellor of the Exchequer asks for it and the Commons approve.

of course gave him the verdict. It is perhaps the sole instance where a private individual has "beat the Government".

It does not follow that every convention when broken involves the King's officers sooner or later in breaches of the law. There is a convention that a Bill before Parliament must be read a certain number of times, before passing through the House of Commons. The machinery of Government will not be thrown out of gear if this particular convention were to be violated. Yet it is true in the main that, though a court of law will not enforce a convention, its breach sooner or later makes complications. *Hence Conventions of the Constitution have practically the same value as Laws of the Constitution.*

There is a recent and most striking action of a Minister which will, if followed by others, and accepted by Ministers as a convention, revolutionise the whole conception of Party Government. When, at the beginning of the Great War, Lord Kitchener took office as War Minister, he made a public statement that he took office in no way identified with a Party, but simply as a general to give his services to the Nation. Such a statement, before Kitchener's action, is unthinkable. However, let us now suppose that, at the next General Election, the Labour Party comes into power, and invites Mr. Montagu to be Secretary of State for India. Before this precedent of Kitchener's, for

Mr. Montagu to accept office could be distinctly construed as betraying his Party. But with that precedent, Mr. Montagu has acquired a freedom to give the best of himself to the nation, irrespective of Party, of which his predecessors never dreamed.[1] Kitchener has indeed started a convention, and if public men are like him to put the Nation first, and Party after, the whole political structure of England will quickly change.[2] That the change will be for the better none will surely question.

There is one further convention to be mentioned, and it is of special interest to us. The Imperial Parliament at Westminster is supreme all over the Empire, and all Colonial Legislatures are in law subordinate to it. Yet there is a convention that Parliament is not to interfere in any Colonial Legislation that is purely domestic. The full significance of this convention for the Indian Legislature will only become evident as time passes, and as our Legislatures exercise the powers entrusted to them.

It will be evident from what I have said of the conventions of England, that the executive power of the sovereign, and the legislative power of the two Houses, are vitally affected by conventions.

[1] Mr. Montagu died before Labour came into power.

[2] This is exactly what has happened as this foot-note is being written in November, 1931. Mr. Ramsay Macdonald has refused to follow his party and has "put the Nation first" in forming a "National Government".

But if a convention limits the power in one department of the political sovereign, it expands the power in the other. What the executive loses, the legislature gains, and what the legislature loses, the judiciary gains. If the King's prerogative is shorn to any extent, it merely means that the subjects share among themselves that much of Kingship. It is of the very nature of sovereignty in a modern State that there should be these transferences of power from one compartment to another.

The supreme value of a convention is that it enables the transference to be made without a crisis, and in a manner suited to the exigency of the occasion. Everything that a convention achieves can of course be brought about by passing a law. But to pass a law means putting the whole creaking machinery of legislation into operation. It may sometimes be done, as when the Parliament Act of 1911 transformed the old convention, that the Lords should not reject a money bill, into a Law of the Constitution. But a convention, because unwritten, is more easily established, and helps too more than a formal law to bring out one vital element of Self-Government, which is, friendly co-operation between majorities and minorities to make a system "work".

Such a convention already exists in several Municipalities in India regarding the community—Hindu, Parsi, Muhammadan or European—from which its Chairman shall be elected by rotation,

whatever be the electoral strength of the communities in the Municipal Council after any election.

Do conventions already exist in the Indian Constitution? Probably one or two does exist. There is, for instance, a provision in the Government of India Act that:

> Where an order or communication concerns the levying of war, or the making of peace, or the public safety, or the defence of the realm, or the treating, or negotiating with any prince or state, or the policy to be observed with respect to any prince or state, and a majority of votes therefor at a meeting of the Council of India is not required by this Act, the Secretary of State may send the order or communication to the Governor-General-in-Council or to any Governor-in-Council or officer or servant in India without submitting it to a meeting of the Council or sending or giving notice of the reasons for making it, if he considers that it is of a nature to require secrecy.

Probably by now we may assert that it is a convention that the Secretary of State should *not* exercise this power given to him by law, but should consult all the members of his Council. There is another right given to the Secretary of State, which is that of filling any vacancy in his Council. But it is surely by now a convention that he shall do so only with the assent of the Viceroy and his Council.

More important, for the moment, than the few conventions which now exist, are those conventions which are quickly coming into being. For conventions must come into existence in India, since our

path to Dominion Status is that trodden by the people of England on their road to Self-Government. Our Constitution, though it starts as a written one, has already, in the few months of its operation, added unwritten elements to it.

Within one year of the making of our Constitution, conventions have come into being modifying that Constitution. The Government of India Act allows the Central Executive in many matters to act without consulting either House of the Legislature, and even contrary to its wish. Yet already, in the course of our parliamentary procedure, the Executive has shown a desire to fall in with the wishes of the Legislature, which certainly is practically going contrary to the letter of the written Constitution. It is certainly not against the *spirit* of the Constitution; on the contrary, it is so much in the spirit of it that the Executive's self-abnegation is a convention which pre-eminently "works".

The division of administrative departments into reserved and transferred has, in the United Provinces become by convention a dead letter. Only the other day, on September 21 last, the Committee on the Repressive Laws recommended, and the Governor-General-in-Council accepted the recommendation, that when an ordinance is going to be declared an emergency measure, the Legislature shall be consulted. Says the report: "We are told . . . if you need exceptional powers prove your

necessity and the Legislatures will grant them. We accept this principle." But the Act gives full power to the Viceroy to act on his own initiative, without even the assent of his Council. What is the recommendation of the Committee, and its acceptance by the Viceroy, but a convention of a very fundamental kind?

We owe to Dr. Annie Besant the suggestion that conventions be created in the Central Government, that the Members of the Council of the Viceroy should consider themselves as Cabinet Ministers responsible to the Legislature, and in the Provinces that the division between reserved and transferred be ignored, as already this year in the United Provinces. There is nothing less improbable than the occurrences of these conventions, in the course of time. Dr. Besant's suggestion is valuable as showing the way to swifter realization of Dominion Status, than if Indians waited for an enlarged written Constitution by another act of Parliament. That such transferences of power by convention are indeed "in the air" is evident from the action proposed by the Governor of Bengal, should an utter cleavage of opinion take place between him and his Legislative Council. "I should ask to be relieved of my responsibilities," said Lord Ronaldshay. Under the old autocratic régime, the Governor would ignore the protests of his Council, and in theory he can still do so by the Reform Act. But that in such a struggle, it is the

Governor who would go, and not the Council, means a transference of power to the people by convention of a remarkable kind.

There are two objections to conventions which I must take up. The first is that there is something unsatisfactory about them, because they are not formal and binding agreements. As a matter of fact, some of the most fundamental privileges of our civic life are utterly informal, and not found in a constitution! The idea of responsible, and representative, Government is at the root of all national life. But this factor of Democratic government is unknown to the Constitution.

> There is no positive law for the establishment of our national representative system. "No statute, no rule of Common Law, no resolution of either House of Parliament, has yet recognised the Cabinet." Responsible Government is non-existent for all that our legal theory knows of it. No formal cognisance is taken, even by the House of Commons itself, of the division into parties and of the fact that the Imperial Executive is a Committee of one of them. And the further fact that this Committee holds office at the mercy of the parliamentary majority is not only not mentioned but it is most carefully and elaborately concealed. (Low)

The "liberty of the press" is one of the most cherished rights in England, and yet it is not recognised in English law. The press is practically a Revising Chamber; it has been called the "fourth Estate". Yet the press as such has no rights at all. As Dicey truly says, "Freedom of discussion is in England little else than the right to write or say anything which a jury, consisting

of twelve shopkeepers, think it expedient should be said or written." That is all there is to the liberty of the press and to freedom of speech!

In practical politics, it is the reality that matters, not the label. Definiteness of effect is more valuable than mere precision of definition. But our Indian love of theory and of precision is dissatisfied with vagueness. We should not however forget that we are going to work with a British type of constitution, which is indeed vague, and not with an American or French type, which is precise. The key which we are to use to unlock our modern Pandora's Box of the blessings of Self-Government must be one that suits the lock. Whether we will or no, England has made the key, and not we. As she puts the box and key into our hands, why look askance at the key?

The second and graver objection to the use of conventions is as follows. Since our Constitution is a written one, and since conventions do modify it, has the Indian Legislature the right to modify its Constitution? Is not any modification whatsoever prohibited by the Government of India Act? The clearest answer to this is by Dicey, who discusses a similar question with regard to New Zealand.

The constitution of New Zealand is created by and depends upon the New Zealand Constitution Act, 1852, 15 & 16 Vict. c. 72, and the Acts amending the same. One might therefore expect that the Parliament of the

Dominion of New Zealand, which may conveniently be called the New Zealand Parliament, would exhibit that "mark of subordination" which consists in the inability of a legislative body to change fundamental or constitutional laws, or (what is the same thing) in the clearly drawn distinction between ordinary laws which the legislature can change and laws of the constitution which it cannot change, at any rate when acting in its ordinary legislative character. But this anticipation is hardly borne out by an examination into the Acts creating the Constitution of New Zealand. A comparison of the Colonial Laws Validity Act, 1865, Section 5, with the New Zealand Constitution Act, as subsequently amended, shows that the New Zealand Parliament can change the articles of the constitution. This power derived from imperial statutes, is of course in no way inconsistent with the legal sovereignty of the Imperial Parliament. One may fairly therefore assert that the New Zealand Parliament, in common with many other colonial legislative assemblies, is, though a "subordinate," at once a legislative and a constituent assembly. It is a "subordinate" assembly because its powers are limited by the legislation of the Imperial Parliament; it is a constituent assembly since it can change the articles of the constitution of New Zealand. The authority of the New Zealand Parliament to change the articles of the constitution of New Zealand is from several points of view worth notice.

We have here a decisive proof that there is no necessary connection between the written character and the immutability of a constitution. The New Zealand constitution is to be found in a written document ; it is a statutory enactment. Yet the articles of this constitutional statute can be changed by the Parliament which it creates, and changed in the same manner as any other law. This may seem an obvious matter enough, but writers of eminence so often use language which implies or suggests that the character of a law is changed by its being expressed in the form of a statute as to make it worth while noting that a statutory constitution need not be in any sense an immutable constitution. The readiness again with which the English Parliament has conceded constituent powers to

colonial legislatures shows how little hold is exercised over Englishmen by that distinction between fundamental and non-fundamental laws which runs through almost all the constitutions not only of the Continent but also of America. The explanation appears to be that in England we have long been accustomed to consider Parliament as capable of changing one kind of law with as much ease as another. Hence when English statesmen gave Parliamentary Government to the colonies, they almost as a matter of course bestowed upon colonial legislatures authority to deal with every law, whether constitutional or not, which affected the colony, subject of course to the proviso, rather implied than expressed, that this power should not be used in a way inconsistent with the supremacy of the British Parliament. The colonial legislatures, in short, are within their own sphere copies of the Imperial Parliament. They are within their own sphere sovereign bodies; but their freedom of action is controlled by their subordination to the Parliament of the United Kingdom.

We can then, according to Dicey, modify our Indian Constitution without consulting Parliament, though of course only in those parts which are not *expressly* prevented from modification, because Parliamentary action is necessary for that. It has been the invariable custom of British democracy for centuries when " given an inch to take an ell ". As Dicey suggests, England is quite willing that all her Dominions should imitate her in that regard; it is of the very essence of Self-Government. If, here in India, when given an inch we take an ell, we are doing exactly what is expected of us! One further thing is expected of us by England, and it is that, when we take, we should take *quietly*. For England hates a fuss.

I should like to make a strong plea for conventions. They are eminently suited to our constitutional growth, and that for two reasons. The first of these is the nature of our electorate. Our masses are illiterate, and several generations must pass before we shall have any effective manhood and womanhood suffrage. But a restricted electorate does not mean a proportionately restricted Self-Government. Probably at the time of Magna Carta and the Bill of Rights, the percentage of electors was but little greater than the percentage of electors under the present Government of India Act. Yet in England autocracy began to be curbed, and a devolution of powers to take place. Steadily the franchise is being extended, the last extension being in February, 1918.[1] In England now, because the form of democracy is a vociferous one, the will of the people probably on the whole prefers written changes in the Constitution. For the changes made are more visible, and democracy likes to be reminded of its powers. But till quite recently, changes have been made, as I have already described, simply by conventions. In fact, it is as if slumbering Demos is roused to be a waking Democracy very largely through the intermediary of conventions. The devolution of power takes place in a gradual way, and not by such "catastrophic"

[1] A further extension was noteworthy for abolishing the clause which gave the vote only to women of thirty and over.

changes, such as **Karl Marx** and his Communist followers have planned for. In a restricted electorate, which is sooner or later going to be transformed into an universal electorate, conventions prevent sudden constitutional upheavals. We are ready for changes in India, but we do not want "catastrophic" changes, for there is as much evil in them as good.

Another reason why conventions should be fostered by us is that we are used to them by long tradition. Our Indian institutions are like the British; they are results of age-long growth. Our temperament at bottom is like the British, in one respect: we prefer to tinker and repair than to build anew. Our religious and social customs during thousands of years have undergone gradual changes, largely by a series of conventions. We are averse to any break with tradition. What Mr. Sydney Low says of his own people is largely true of ourselves.

> It is true that the Englishman has a reverence for the past, which is not exceeded in any Western country. *Stare super antiquas vias* is with him not so much an axiom as a religion. When a change is contemplated he prefers to justify it, not by an appeal to general principles, but by showing that it is in accordance with precedent and natural and necessary consequence of what has gone before. Hence we have the strange spectacle, witnessed in England with a complacency that amazes foreigners, of new legislation constantly supported by reference to the practice and maxims of community in which the problems of modern society could not have been conceived by the liveliest imagination. In the age of railways and wireless telegraphy, and flying machines, we are

still guided by the authority of legislators who knew nothing of steam-power, and sometimes even by precedents drawn from the acts of sovereigns and statesmen who died before the invention of gunpowder and printing.

But we look to the past not merely because it is the past—always a recommendation in itself to Englishmen—but because our formal constitution is strictly a legal system. It is founded on law; and in all the great struggles of our history there has been a constant reference, if not to positive enactments, at any rate to legal principles and methods. Our constitution, as one of the ablest expounders of it has declared, is supposed to be part of our Common Law. Changes, especially those of an organic nature, have been defended mainly on the ground that they were either the actual revival of ancient rights or the abolition of unwarranted accretions upon the established customs. To the Englishman, in his political capacity, "use" was what was sought and venerated; the "abuse" was only the perversion of good custom. Our forefathers "wanted nothing new; to stand upon the old way was their interest and desire".

Now the Indian does in his heart of hearts desire "to stand upon the old way". Conventions avoid a sudden break with the past, a strong recommendation in themselves to us who like all our institutions to be "Sanātana", "the ageless."

In conclusion, I must meet one formidable objection to my whole thesis. In England, conventions have sprung up haphazardly; no one set about *making* conventions. The drift of my thesis is that we should. The objection may be made that conventions cannot be created beforehand by theory. I think they can, legitimately. Note the difference between England at the time of Magna Carta and ourselves to-day. If we compare a

constitution to a railway engine, England has had herself, unassisted, to assemble the parts of her engine, and to put them together, and lay down the rails ; naturally the proceeding has taken centuries. But with India, the machine has been very quickly put together (though it is a small machine compared to England's) and the rails swiftly laid down by both England and India. We are starting with a constitution ready made, and what we need is only more "steam up". I mentioned that the phrase "Responsible Government" appears nowhere in England's constitution. But in the opening clause of the Government of India Bill that phrase appears, as also the words "self governing institution". We can begin from where England now is. There is no need for us to follow the slow course, in every detail, of English constitutional growth. We can make use of England's experience, avoid her mistakes, and use to the full, and at once, all she has found serviceable.

I believe we have got to "get up more steam," somehow. If India is of value to the British Empire, then, seeing the portentous problems before the Empire, the sooner India comes to full Dominion Status the better. For if it is good to have a strong Empire, then it cannot be too strong, if it is to serve the best interests of mankind. None of us in this Club doubt that we are meant to achieve Dominion Status. Then, let us set to work deliberately to "get there". And for that, conventions

will help us enormously. They have helped England. Need we doubt that what is good for the Englishman is just as good for the Indian?

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